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SHAHARUDDIN MOHAMMAD

v.

MALAYAN BANKING BHD

B

HIGH COURT MALAYA, JOHOR BAHRU
VERNON ONG LAM KIAT J
[CIVIL SUIT NO: (MT-1) 22-174-2005]
24 AUGUST 2010

C ***TORT:*** *Defamation - Summons - Summons against plaintiff as second defendant discontinued - Notice of substituted service against first defendant published in newspaper - Notice directed at first defendant but named plaintiff as second defendant in suit - Whether defamatory of plaintiff - Whether privileged - Whether justified*

D ***CIVIL PROCEDURE:*** *Service - Substituted service - Notice of - Summons against plaintiff as second defendant discontinued - Notice of substituted service against first defendant published in newspaper - Notice directed at first defendant but named plaintiff as second defendant in suit - Whether defamatory of plaintiff*

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The plaintiff and one Affendi, who were partners in a firm ('Atasha'), were sued by the defendant bank for monies lent and owing ('the suit'). Subsequently, upon the plaintiff repaying half of the debt, the defendant relieved the plaintiff of liability over the
F balance sum owed. The defendant also instructed its solicitors to cease legal action against the plaintiff. In the meanwhile, the defendant continued the summons against the first defendant Affendi. However, as the summons could not be served personally on Affendi, the defendant obtained an order for substituted service
G and had the Notice thereof published in the newspaper. It was not in dispute that the Notice, while being directed at Affendi, also bore the name of the plaintiff as the second defendant in the suit. The plaintiff alleged that the Notice, by its natural and ordinary meaning was defamatory of him, and in the
H circumstances, filed the present action against the defendant claiming damages and other relief. The defendant argued that the Notice was justified and published on an occasion of privilege, and in any case was not defamatory of the plaintiff, and so implored the court to dismiss the action.

I

Held (dismissing action with costs):

(1) The fact that the defendant did not intend the Notice to be read adversely against the plaintiff is irrelevant for the purpose of construing the Notice as a whole. The test is objective and not subjective. Read objectively, the Notice would convey to the reader that a civil suit has been filed against Affendi and the plaintiff. It is, however, pertinent to observe that the Notice was addressed to or directed at Affendi, and not the plaintiff. In the circumstances, it is very unlikely that a reader will have concluded that the plaintiff is an untrustworthy person, uncreditworthy and a financial and business risk, as alleged. The message is simply that a civil suit has been instituted against Affendi and the plaintiff and that the Notice is directed to Affendi. (paras 13 & 14)

(2) Even assuming that the Notice is defamatory of the plaintiff, the fact remains that it was published pursuant to a court order. Further, the fact that the plaintiff was named as the second defendant in the Notice is true and accurate, notwithstanding that the defendant had instructed its solicitors to stop legal action against the plaintiff. Hence, the defamatory imputation, if at all, is justified. (para 15)

Case(s) referred to:

Chew Peng Cheng v. Anthony Teo Tiao Gin [2008] 8 CLJ 418 HC ***(refd)***

Kian Lup Construction v. Hongkong Bank Malaysia Bhd [2002] 7 CLJ 32 HC ***(refd)***

Lau Khuan Siew v. Guinness Anchor Marketing Sdn Bhd [2000] 1 LNS 353 HC ***(refd)***

Wong Cham Mew v. Hong Leong Finance Bhd [1998] 1 LNS 58 HC ***(refd)***

For the plaintiff - Haffirudin Osman; M/s Haffirudin Osman & Co

For the defendant - Ng Kian Pin (Nor Azah Nor Aziz with him); M/s Zaid Ibrahim & Co

Reported by Wan Sharif Wan Ahmad

JUDGMENT

Vernon Ong Lam Kiat J:

[1] On 6 December 2001 a notice of a substituted service of summons ('the notice') was published in The Sun newspaper by Malayan Banking Berhad 'the defendant') in which Shaharuddin

bin Mohammed ('the plaintiff') is cited as the 2nd defendant therein. The plaintiff alleges that the publication of the notice is defamatory of the plaintiff.

The Undisputed Facts

[2] The plaintiff and one Affendi bin Ahmad were partners of the business known under the name and style of "Atasha Hi-Tech" ('Atasha'). Atasha obtained a credit facility from the defendant. In default of repayment of the credit facility the defendant instituted legal proceedings *vide* Johor Bahru Sessions Court Summons No. 52-4247-2000. In the summons Affendi is cited as the 1st defendant whilst the plaintiff is cited as the 2nd defendant. Upon receipt of the summons the plaintiff approached the defendant with a view of settlement. It was agreed between the parties that in settlement the plaintiff pay 50% of the total outstanding sum. The plaintiff effected payment on 11 April 2001. In acknowledgement and receipt thereof the defendant issued a letter discharging the plaintiff from further liability over the balance of the debt owed by Atasha. On 11 April 2001 the defendant also instructed its solicitors to stop legal action against the plaintiff.

[3] In the meantime the defendant continued with the summons against Affendi. As the summons could not be served personally on Affendi, the defendant applied for and obtained an order for substituted service of the summons on Affendi. On 6 December 2001 the notice was published in The Sun newspaper.

Plaintiff's Case

[4] The fact that the plaintiff's name appears in the notice as a co-defendant is defamatory of the plaintiff. The notice bearing the plaintiff's name is defamatory of the plaintiff. According to para. 6 of the statement of claim, in their natural and ordinary meaning the notice meant and were understood to mean that:

(a) the plaintiff is not capable of settling his debts or has the tendency of not settling his debts;

(b) the plaintiff has run away without paying his debts;

(c) the plaintiff is truly the 2nd defendant in the civil suit No. 52-4247-2000 as appeared in the notice as at 6 December 2001;

(d) the plaintiff on 16 December 2001 is truly indebted to the defendant in the sum of RM48,211.55;

(e) the plaintiff has accepted service of the summons and statement of claim on or before 6 December 2001;

(f) the plaintiff cannot be trusted, not having credit and financial worthiness and of no value and having bad reputation among in society;

(g) the plaintiff cannot be trusted not having credit and financial worthiness and is a prospect of high risk to the financial institution;

(h) the cause of action against the plaintiff is still subsisting;

(i) the plaintiff still has liability to the defendant;

(j) the Sessions Court Judge Johor Bahru has sanctioned and acknowledged that the claim against the plaintiff is true and or still subsisting and or the plaintiff at the material time truly owed the defendant and or the plaintiff accepted service of summons and statement of claim and or a judgment has been entered against the plaintiff;

(k) that a judgment in default and or consent judgment has been recorded or in the alternative that the plaintiff is denying the defendant's claim by filing a defence.

[5] It is also pleaded in para. 7 of the statement of claim that by way of innuendo the notice meant and were understood to mean:

(a) that debtors whose names are published in legal notices are taken as being incapable of paying their debts and having no credit worthiness;

(b) that banks, financial institutions, companies, agencies, government and other parties would look and deal with debtors whose names are published in advertised legal notices to check their credit worthiness and financial and business and or credit evaluation;

(c) that banks, financial institutions, companies, agencies, government and other parties would look and deal with debtors whose names are published in advertised legal notices in a negative way with prejudice and or rejection refusal and

placing a bug hurdle for any or all transactions, financial, trade or others and or different ways of treatment contrary to if the Notice was not advertised;

(d) that debtors whose names are published in the advertised legal notices are open to ridicule and normally seen as untrustworthy and without credit and financial worthiness by the readers of the newspaper and society in general;

(e) that debtors whose names are published in the advertised legal notices are in fact and truly indebted by the readers of the newspaper and society in general;

(f) that debtors whose names are published in the advertised legal notices are those who cannot afford to pay their debts and or who have failed to pay their debts;

(g) that debtors whose names are published in the advertised legal notices are those truly liable and indebted and truly the parties in the civil suit;

(h) that debtors whose names are published in the advertised legal notices are those against whom proceedings were taken and who had refused, neglected and or intentionally evaded paying their debts;

(i) that debtors whose names are published in the advertised legal notices are those who cannot be trusted, do not have credit and financial ability and worthiness and a high risk to financial institutions;

(j) that debtors whose names are published in the advertised legal notices are still indebted and remains in debt and that the civil suit is taken because of the debt; and

(k) have been sanctioned by the court and have acknowledged that the amount claimed and the parties involved are correct.

[6] The plaintiff only knew of the notice when his credit card application was denied. The plaintiff was also given a show cause letter by his employer as a result of the notice advertised by the defendant. Consequently, the plaintiff is claiming for general damages, special damages, aggravated damages, interest, costs and for an order that the defendant cause or procure the removal of the plaintiff's name from the blacklist of financial institutions.

Defendant's Case

[7] The defendant's case is grounded on three main planks. First, even though the notice contained the plaintiff's name as the second defendant in the legal action, the notice was directed at Affendi. It was not directed to the plaintiff. In the premises the notice was justified. Secondly, the notice was published pursuant to a court order for substituted service. As such the publication of the notice was on an occasion of privilege. Thirdly, the contents of the notice in its natural and ordinary meaning is not defamatory of the plaintiff.

Findings Of The Court

[8] In order to appreciate the exact nature of the notice which was published in The Sun, it is necessary to reproduce the notice below:

Dalam Mahkamah
Sesyen Di Johor Bahru
Dalam Negeri Johor
Malaysia

Saman No.
52-4247 Tahun 2000 (4)

Antara

Malayan Banking Berhad (3813-K)	...	Plaintif

Dan

1. Affendi Bin Ahmad (K/P No. A1190057)		
2. Shaharuddin Bin Mohammad (K/P No. A2386148) Berniaga sebagai rakan kongsi dibawah nama dan bergelar sebagai Atasha Hi-Tech (JM0258408-M)	...	Defendan-Defendan

Notis

Kepada:

Defendan Pertama
Affendi Bin Ahmad
(K/P No. A2386148)
No. 2, Jalan Mawar 1
Taman Mawar
81700 Pasir Gudang, Johor.

AMBIL PERHATIAN bahawa suatu tindakan telah dimulakan terhadap kamu di Mahkamah Sesyen Johor Bahru dalam Saman No. 52-4247 Tahun 2000 (4) oleh Malayan Banking Berhad Tkt. 5, No. 11, Jalan Selat Tebrau, 80000 Johor Bahru yang mana tuntutan Plaintif adalah untuk jumlah sebanyak RM48,211.55 dengan faedah atasnya pada kadar 2% setahun atas kadar Pinjaman Asas kiraan harian mulai dari 1.11.2000 serta faedah keingkaran 1.00 setahun keatas segala wang terhutang sehingga penyelesaian penuh dan kos DAN BAHAWA ialah diperintahkan bahawa serahan Saman ini dalam tindakan tersebut kepada kamu dilaksanakan dengan penampalan sesalinan Saman tersebut bersama-sama dengan Perintah Serahan Ganti pada papan kenyataan Mahkamah Sesyen di Johor Bahru dan dialamat terakhir kamu di No. 2, Jalan Mawar 1, Taman Mawar, 81700 Pasir Gudang, Johor dan melalui iklan ini. JIKA KAMU berhasrat untuk membela dalam tindakan kamu mestilah hadir secara sendiri atau melalui peguam kamu dihadapan Mahkamah Sesyen (4) Johor Bahru pada 16.1.2002 pukul 9.00 pagi. JIKA INGKAR apa-apa kehadiran yang demikian maka penghakiman boleh dibuat terhadap kamu.

Bertarikh pada
27 haribulan November 2001

Tt
A RAHIM & CO
Peguambela & Peguamcara

Notis ini telah dikeluarkan oleh Tetuan A Rahim & Co., peguamcara bagi Plaintif yang beralamat di Suite 809, Tingkat 8, Bangunan Johor Tower, 15, Jalan Gereja, 80000 Johor Bahru.

(emphasis added)

Law Of Defamation

[9] The law on this subject has been comprehensively dealt with by Hamid Sultan Abu Backer JC (now J) in *Chew Peng Cheng v. Anthony Teo Tiao Gin* [2008] 8 CLJ 418 where he said:

> [6] The definition of defamation is not a static concept. The learned authors of Gatley on Libel and Slander (6th edn.) have observed:
>
> > There is no wholly satisfactory definition of a defamatory imputation. Any imputation which may tend 'to lower the plaintiff in the estimation of right-thinking members of society generally', 'to cut him off from society' or 'to expose him to hatred, contempt or ridicule', is defamatory of him. An imputation may be defamatory whether or not it is believed by those to whom it is published.
>
> [7] There are number of cases which have attempted to define defamatory conduct or imputations. Some of them are as follows:
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> (a) In *Sim v. Stretch* [1936] 2 All ER 95, Lord Atkin opined, whether the words were calculated to expose him to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in the estimation of right-thinking members of society generally.
>
> (b) In *Berkoff v. Burchill* 4 All ER 1008, the English Court of appeal decided that any imputation that the plaintiff was 'hideously ugly' was capable of being defamatory if the words were plainly intended to convey that message by way of ridicule.
>
> (c) In *Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 1 LNS 146, Mohamed Azmi J (as he then was) opined:
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> > Thus, the test of defamatory nature of a statement is its tendency to excite against the plaintiff the adverse opinion of others, although no one believes the statement to be true. Another test is: would the words tend to lower the plaintiff in the estimation of right-thinking members of society generally? The typical type of defamation is an attack upon the moral character of the plaintiff attributing crime, dishonesty, untruthfulness, ingratitude or cruelty.
>
> (d) In *Chok Foo Choo v. The China Press Bhd* [1999] 1 CLJ 461, Gopal Sri Ram JCA said:

> In my judgment, the test which is to be applied lies in the question: do the words published in their natural and ordinary meaning impute to the plaintiff any dishonourable or discreditable conduct or motives or a lack of integrity on his part? If the question invites an affirmative response, then the words complained of are defamatory.

(e) In *Tun Datuk Patinggi Haji Abdul Rahman Ya'kub v. Bre Sdn Bhd & Ors* [1995] 1 LNS 304, Richard Malanjum J (as he then was) followed the instance of *JB Jeyaretnam v. Goh Chok Tong* [1984] 1 LNS 139 and adopted the following approach:

> As to whether the words complained of in this case were capable of being, and were, in fact, defamatory of the plaintiff, the test to be considered is whether the words complained of were calculated to expose him to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in the estimation of right-thinking members of society generally.

[8] In this area of law it is now almost settled that to be defamatory, an imputation need have no actual effect on a person's reputation, the law looks only to its tendency. There are at least more than six heads of investigation the court employs to determine liability on defamation. They can be summarized as follows:

The Ordinary And Natural Meaning

(a) The ordinary and natural meaning of words may be either the literal meaning or it may be an implied or inferred or an indirect meaning. Therefore, any meaning that does not require the support of extrinsic facts passing beyond general knowledge but is a meaning which is capable of being detected in the language used can be part of the ordinary and natural meaning of words. (see *Jones v. Skelton* [1963] 3 All ER 952).

Whether The Words Are Defamatory Of The Plaintiff

(b) In considering the natural and ordinary meaning complained of it is also necessary to consider whether they were defamatory of the plaintiff. In *Sim v. Stretch* [1936] 2 All ER 952, Lord Atkin observed:

> Whether the words were calculated to expose him to hatred ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in the estimation of right-thinking members of society generally.

In *J.B. Jeyaretnam v. Goh Chok Tong* [1984] 1 LNS 139, it was opined that the words must be considered in the context of the whole speech made by the defendant and in those circumstances. Further, the meaning of the words is a question entirely for the court. The meaning intended by the publishers is irrelevant for the purpose of construing the words. The test is objective and not subjective. The real question for the court to determine is whether under the circumstances in which the writing was published, reasonable men, to whom the publication was made, would be likely to understand it in a libellous sense. (see *Lee Kuan Yew v. J.B. Jeyaretnam* [1978] 1 LNS 93).

The Words Must Refer To The Plaintiff

(c) It is trite there is no necessity to show that the defendant intended to refer to the plaintiff. It is sufficient if reasonable people would think the language to be defamatory of the plaintiff, it was immaterial that the defendants did not intend to defame him. (see *E. Hulton & Co v. Jones* [1910] AC 20).

In *Knappffer v. London Express Newspaper Ltd.* [1944] AC 116, it was stated that it is an essential element of the cause of action for defamation that the words complained of should be published "of the plaintiff". Where he is not named, the test is whether the words would reasonably lead people acquainted with him to the conclusion that he was the person referred to. The question whether they did so, in fact does not arise if they cannot in law be regarded as capable of referring to him. If a defamatory statement made of a class or group can reasonably be understood to refer to every member of it, each one has a cause of action.

(i) The test is an objective test and not subjective. In *Newstead v. London Express Newspapers Ltd.* [1940] 1 KB 377, the reasonable meaning of the words upon the question of whether they refer to the plaintiff must be tested objectively and not subjectively. The question is what do the words mean as words, not what the defendant in his own mind meant by them or intended to mean. However, if it is unintentional defamation s. 7 of Defamation Act 1957 (DA 1957) provides a defence of unintentional defamation. Criteria that need to be satisfied before the defences succeed are as follows: (i) that the publisher did not intend to publish them of and concerning that other person, and did not know of circumstances by virtue of which they might be understood to refer to him; or (ii) that the words were not defamatory on the

face of them, and the publisher did not know of circumstances by virtue of which they might be understood to be defamatory of that other person and in either case that the publisher exercised all reasonable care in relation to the publication.

For the defence to be applicable, the defendant must have made an offer of amends as set out in s. 7 of DA 1957 which reads as follows:

(i) in any case, to publish or join in the publication of a suitable correction of the words complained of, and sufficient apology to the party aggrieved in respect of those words;

(ii) where copies of a document or record containing the said word have been distributed by or with the knowledge of the person making the offer, to take such steps as are reasonably practicable on his part for notifying persons to whom copies have been so distributed that the words are alleged to be defamatory of the party aggrieved.

The Words Must Be Published

(d) Published in the law of defamation has a special meaning and at times much dispute takes place whether there was publication. There would not be publication of the words complained if the offensive material was sent directly to the person of whom it is written. It is often the case that the person who is supposed to receive it in the ordinary cause of events will not have done so but may have been for example received by the secretary who may have instructions to open the mail. This is an area of law which promotes fertile litigation and occupies much of the court's time. (see *Faryne v. Chorny* [1951] 4 WWR 171).

Innuendo

[9] Innuendo generally means the defamatory words complained of contain a hidden meaning or inner meaning. Though the words may not be defamatory in their natural and ordinary meaning, it is a strict rule of pleadings that innuendo must be pleaded and proved. (*Allsop v. Church of England Newspaper Ltd.* [1972] 2 QB 161; *Tolley v. J.S. Fry & Sons Ltd.* [1931] AC 333).

Defences

[10] The well known defences in an action for defamation are about five and I have already dealt with one of them earlier in my judgment relating to unintentional defamation. The others are as follows:

(a) Justification

In a plea of justification, it is essential for the defendant to prove that (i) the defamatory imputation is true; (ii) justify the precise imputation complained of; and (iii) prove the truth of all material statements in the libel. There must be substantial justification of the whole libel. However, it is not necessary to prove the truth of every word of the libel. (see *Workers' Party v. Tay Boon Too; Workers' Party v. Attorney-General* [1947] 1 LNS 120; [1975] 1 MLJ 47). Further, it is not necessary to prove the truth of every charge if the words not proved to be true do not materially injure the plaintiff's reputation, having regard to the truth of the remaining charges. This is specifically set out in s. 8 of DA 1957 which reads as follows:

It is necessary to prove the truth of every charge if the words not proved to be true do not materially injure the plaintiff's reputation, having regard to the truth of the remaining charges.

(b) Fair Comment

The meaning of fair comment has not been specifically defined in any case as it is a commonsense construction for example, in *Merivale v. Carson* [1888] QBD 275, Lord Esher at p. 280 opined:

what is the meaning of a "fair comment"? I think the meaning is this: is the article in the opinion of the jury beyond that which any fair man, however prejudiced or however strong his opinion may be, would say of the word in question? Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment on the word

And at p. 283 Bowen LJ stated:

it is only when writer goes beyond the limits of fair criticism that his criticism passes into the region of libel at all ... The criticism is to be 'fair', that is, the expression of it is to be fair. The only limitation is upon the mode of expression. In this country a man has a right to hold any opinion he pleases, and to express his opinion, provided that he does not go beyond the limits which the law calls "fair", and, although we cannot find in any decided case an exact and rigid definition of the word 'fair', this is because the judges have always preferred to leave the question what is 'fair' to the jury. The nearest approach, I think, to an exact definition of the word 'fair' is contained in the judgment of Lord Tenterden

A CJ, in *Macleod v. Wakley* [1828] 3 C & P 311 at 313, where is said, "whatever is fair, and can be reasonably said of the works of authors or of themselves, as connected with their works, is not actionable, unless it appears that, under the pretext criticizing the works, the defendant takes an opportunity of attacking the character of the author; then it will be a libel.

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It is trite that to succeed, the defence must establish: (i) the words complained of are comment, though it may consist of or include inference of facts; (ii) the comment is on a matter of public interest; (iii) the comment in based on facts; (iv) the comment is one which a fair-minded person can honestly make on the facts proved.

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Further, it is not necessary to prove for the defence of fair comment to succeed, to prove each of the facts pleaded in support; all that is needed is to prove such of the facts as are sufficient to form the basis of a fair comment. The test is an objective one and not subjective, ie, whether on all the facts of the case a fair minded person could have honestly come to the conclusion as the defendant did. In *Merivale v. Carson (supra)*, Lord Esher opined:

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E ... Every latitude must be given to opinion and to prejudice, and then an ordinary set of men with ordinary judgment must say whether any fair man would have made such a comment on the work. It is very easy to say what would be clearly beyond that limit; if, for instance, the writer attacked the private character of the author. But it is much more difficult to say what is within the limit. That must depend upon all the circumstances of the particular case ...

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However, the defence of fair comment will fail if it is spiked with malice. The test for malice was set out by the House of Lords in *Horrocks v. Lowe* [1975] AC 135 as follows:

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that is, where the defendant knew the publication to be false or where the defendant made the publication recklessly, being indifferent to the truth of what he published and neither considering nor caring whether it was true or not or whether he knew the publication to be false.

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(c) Privilege

As a general rule, privilege can be classified into two types, namely absolute and qualified privilege. Absolute privilege arises in very limited circumstances for some of them are as follows: (i) statements made in Parliament; (ii) reports, papers, votes and

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proceedings ordered to be published by either House of Parliament; (iii) judicial proceedings; (iv) communication between solicitor and client made in connection with litigation; (v) communication made by one officer of state to another in the course of official duty; (vi) section 11 of the Defamation Act provides a defence of absolute privilege as regards fair, accurate and contemporaneous reports of judicial proceedings in Malaysia.

It is trite that where the defendant raises the defence of absolute privilege; it is for him to establish the same. Qualified privilege arises in consequence of public policy grounds. In *Adam v. Ward* [1917] AC 309, Lord Atkinson opined:

a privileged occasion is, in reference to qualified privilege, an occasion where the person who makes a communication has an interest or a duty, legal, social, or moral, to make it to the person to whom it is made, and the person to whom it is so made has a corresponding interest or duty to receive it. This reciprocity is essential.

It is essential for the defence of qualified privilege to succeed; to at least satisfy two criteria, ie, one there is a legal, moral or social duty to make the statement on one side. The other is that there is a corresponding interest to receive it. However, if it is spiked with malice, this defence will not be available. (see *Rajagopal v. Rajan* [1971] 1 LNS 117). Ramsamalar Poopalasingam in the article *'The Law of Defamation in Malaysia and Singapore'* [1988] MLJ 1 succinctly summarises as follows:

(i) fair and accurate reports of parliamentary proceedings; (ii) under section 12(1) of the Defamation Acts of Malaysia and Singapore, certain publication in newspapers are privileged. The types of publication that are privileged are stated in Part I of the Schedule to the Defamation Acts of Malaysia and Singapore; (iii) under section 12(2) of the Defamation Acts of Malaysia and Singapore, certain publications in newspapers are privileged provided the defendant has published a reasonable letter or statement by way of explanation or contradiction if requested by the plaintiff. The situations to which section 12(2) applies are stated in Part II of the Schedule of the Defamation Acts of Malaysia and Singapore;

(iv) statements made by A to B about C

(a) which A is under a legal, moral or social duty to communicate to B and which B has a corresponding interest in receiving. In the case of *J.B. Jayaretnam v. Goh Chok Tong* [1984] 1 LNS 139; [1985] 1 MLJ 334, the defendant sought to argue that statements

made by him fell under this category. He sought to found the defence of qualified privileged on the fact that at the material time there was a by-election and that the defendant as a politician had a social duty to inform representatives of the media his assessment of the political opponents and that such representatives had a corresponding duty or interest to receive it. Such arguments were rejected;

(b) where A has an interest to be protected and B is under corresponding legal, moral and social duty to protect that interest. In *Rajagopal v. Rajan* [1971] 1 LNS 117; [1972] 1 MLJ 45, it was stated that the fact that communication between A and B is privileged does not justify A in making the communication in a manner or at a time which would involve its publication to other persons who have no such interest or duty. No privilege would *prima facie* attach to the publication;

(v) statements made in the protection of oneself or of one's property. An example of this situation is the case of *Osborne v. Boulter* [1930] 2 KB 226. In this case, a publican complained to the brewers who supplied him with beer that it was of poor quality. They said that they had heard rumours that the poorness of the beer was due to the watering of it by the publican, and they published this statement to a third party. It was held to be privileged;

(vi) statements made to the proper authorities in order to procure the redress of public grievances. The complaint, in order to be privileged, must be addressed to the right person, that is, to someone who has some power of redressing the grievance. Meticulous selection of the proper official is not necessary.

And concludes as follows:

The law of defamation in Malaysia and Singapore closely follows the English laws on defamation. It is a matter of law for the judge to determine whether or not the words complained of are capable of a defamatory meaning and whether the words complained of are capable of being taken as referring to the plaintiff. In practice, this is certainly, not an easy decision to make and may lead to division of judicial opinion. If the judge is left in doubt, he should rule that the words are incapable of a defamatory meaning. Perhaps the difficulty lies with the test laid down by Lord Atkin in the case of *Sim v. Stretch* [1936] 2 All ER 952, that is, whether the words were calculated to expose him to hatred, ridicule or contempt in the mind of a reasonable man or would tend to lower the plaintiff in the estimation of right-thinking

members of society generally. The phrases 'the mind of a reasonable man' and 'in the estimation of right-thinking members of society generally' make this test an objective one. However, it is not always easy to perceive what opinion the reasonable man would hold and also it is difficult to define who right-thinking members of society are or what their estimation of the particular words alleged to be defamatory would be.

Findings Of The Court

[10] The principal questions to be determined relate to whether the notice is defamatory of the plaintiff, and if so, whether the defamatory imputation is justified.

Whether The Notice Is Defamatory Of The Plaintiff?

[11] It is not disputed that the plaintiff was indebted to the defendant and that the defendant had filed a civil suit against Affendi and the plaintiff. After being served with the summons and statement of claim the plaintiff went to the defendant's loan management centre. It was agreed between the plaintiff and the defendant that if the plaintiff paid RM25,343 the plaintiff would be discharged from further liability on the balance amount owing by Atasha. After the plaintiff paid the defendant on 11 April 2001, the defendant instructed its solicitors to stop legal action against the plaintiff.

[12] In order to assess whether the notice is defamatory of the plaintiff, it is necessary to examine the notice as a whole. The plaintiff's name and identity card number is spelt out in the intitulment of the summons as the 2nd defendant. Further down, it is spelt out in the notice that a substituted service of summons is only addressed to Affendi, the 1st defendant named therein. In the circumstances it is clear that the notice was addressed to and directed at Affendi.

[13] However, the fact remains that the plaintiff's name was cited as the 2nd defendant therein. The fact that the defendant did not intend the notice to be read adversely against the plaintiff is irrelevant for the purpose of construing the notice as a whole. The test is objective and not subjective. Read objectively, the notice would convey to the reader that a civil suit has been filed against Affendi and the plaintiff. As the summons and statement of claim could not be served on Affendi, the defendant proceeded

A to advertise the notice after obtaining an order for substituted service. The court agrees with the views expressed by Rahmah Hussain J (later FCJ) in *Lau Khuan Siew v. Guinness Anchor Marketing Sdn Bhd* [2000] 1 LNS 353 where her Ladyship said:

B > It is also my considered opinion that a reasonable man would not have concluded that a notice of substituted service indicates that the Plaintiff is a dishonest businessman as it is obvious that such notice merely indicates that a suit has been filed against a certain person and it cannot be served on him personally.

C **[14]** It is pertinent to observe here that the notice was not addressed to or directed at the plaintiff; instead the notice was clearly addressed to and directed at Affendi. In the circumstances, it is very unlikely that a reader will have concluded that the plaintiff is an untrustworthy person, uncredit worthy and a financial D and business risk. The message is simply that a civil suit has been instituted against Affendi and the plaintiff and that the notice is directed to Affendi (see also *Wong Cham Mew v. Hong Leong Finance Bhd* [1998] 1 LNS 58; *Kian Lup Construction v. Hongkong Bank Malaysia Bhd* [2002] 7 CLJ 32).

E *Whether The Defamatory Imputation Is Justified?*

[15] Even assuming that the notice is defamatory of the plaintiff, it is not disputed that the notice was published pursuant to a court order; this fact is also pleaded in para. 5 of the statement F of defence. Learned counsel for the defendant submitted that as the order for substituted service was directed against Affendi it was procedurally impossible to remove the plaintiff's name from the original suit. It is an established fact that the plaintiff was sued as the 2nd defendant in the civil suit. The publication of the notice G was pursuant to a court order. In addition, the fact that the plaintiff was named as the 2nd defendant in the notice is true and accurate; notwithstanding that the defendant had instructed its solicitors to stop legal action against the plaintiff. In short, the defamatory imputation is justified.

H **[16]** For the above reasons the plaintiff's claim is dismissed with costs of RM10,000.

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